Topco, where small competitors have legitimately joined to enhance their competitiveness, could be such an exception.[45] The exception could be defined to encompass only those cases in which no conceivable price fixing was possible and where small ventures enhance their competitiveness against larger concerns.

Antitrust policy represents, to a certain extent, the result of balancing two generally conflicting goals. The desire for efficient large business opposes the "Jeffersonian wish to preserve small business".[46] *Topco* represents the fulfillment of both desires, small businesses gaining economies of scale. *Per se* rules occupy a beneficial place in the structure of antitrust. *Topco*, however, strongly indicates a need for greater flexibility in their formulation.

RICHARD A. MALM

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[45] *Cf.* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961).

[46] P. AREEDA, *supra* note 38, at 106.

CONSTITUTIONAL LAW—THE USE OF UNCOUNSELED PRIOR CONVICTIONS TO IMPEACH DEFENDANT'S CREDIBILITY DEPRIVES DEFENDANT OF DUE PROCESS OF LAW WHERE SUCH USE MIGHT INFLUENCE THE OUTCOME OF THE CASE.—*Loper v. Beto* (U.S. Sup. Ct. 1972).

The defendant was brought to trial in 1947, upon a charge of statutory rape in a Texas criminal court. The sole prosecution witness was the victim, the eight-year-old stepdaughter of the defendant, who identified him as the perpetrator. Defendant, the only witness for the defense, took the stand in his own behalf, denying the assault. The prosecution was permitted to cross-examine defendant about his prior criminal record to impeach his credibility. The defendant responded, admitting four previous felony convictions between the years 1931-40, none committed within Texas. Following a one-day trial, the jury found defendant guilty and sentenced him to fifty years in prison. On application for writ of habeas corpus to the United States District Court for the Southern District of Texas in 1969, the court denied relief,[1] holding that the question of the constitutional invalidity of the prior convictions was not of constitutional stature nor subject to collateral attack. The Court of Appeals for the Fifth Circuit affirmed,[2] noting that the use for impeachment is not as serious as the use for enhancement of punishment. The United States Supreme Court *Held*, reversed and remanded, four justices dissenting. The use of uncounseled convictions for impeaching the testimony of a defendant is a violation of due process of law. *Loper v. Beto*, 405 U.S. 473 (1972).

The majority, considering the question presented, applied the rule announced in *Gideon v. Wainwright*,[3] and its sequels.[4] The dissent declared that while the *Gideon* rule retroactively[5] applies to uncounseled felony convictions decided in the past rendering them invalid for all *future* purposes, it does not affect such prior invalid convictions used for impeachment *before* the *Gideon* decision.[6] The dissent seemed to be assuming *Gideon* was a radical holding that prevented retroactive application to reverse the lower court holding in *Loper*.[7] An explanation of the decisions leading up to *Gideon* and an examination of the *Gideon* rule applied to subsequent decisions will show the error of the dissent's assumption.

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1 The memorandum and order of the District Court are unreported.

2 Loper v. Beto, 440 F.2d 934 (5th Cir. 1971).

3 372 U.S. 335 (1963): "In the absence of waiver, a felony conviction is invalid if it was obtained in a court that denied the defendant the help of a lawyer." Loper v. Beto, 405 U.S. 473, 481 (1972).

4 Burgett v. Texas, 389 U.S. 109 (1967); United States v. Tucker, 404 U.S. 443 (1972).

5 The *Gideon* case was declared retroactive in *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963); *accord*, Kitchens v. Smith, 401 U.S. 847 (1971).

6 405 U.S. 473, 491 (1972).

7 Loper v. Beto, 440 F.2d 934 (5th Cir. 1971).

The equitable nature of the adversary system requires that neither side in a criminal case should possess an unwarranted advantage at the commencement nor during the progress of a case. The use of the prior felony convictions to impeach the defendant's credibility in *Loper* was primarily to create a windfall for the state in the jury's mind.[8] Consequently the *Loper* majority found this inference of defendant's guilt to be too prejudicial to the outcome of the case. The introduction of Loper's prior felony convictions by the prosecution on cross-examination, not only affected the defendant's credibility, but possibly enhanced Loper's punishment.[9]

Statutes are common in the United States permitting an accused person to testify in his own behalf and permitting evidence of the accused's prior criminal record to impeach his credibility.[10] This places the defendant in a grievous dilemma having a prejudicial impact in a criminal case. A defendant's admission of past convictions may posit evidence of guilt in the jury's mind, or, at the least, a desire to protect society, regardless of the court's instructions. However, an accused's silence may impart a feeling of guilt to the jury.[11] Since the ultimate goal in a criminal trial is to arrive at the truth in disposing of the charge, the possibility that the jury will be exposed to only one version of the truth may or may not aid in that determination.[12] Accordingly the means used in the weighing process should not rest upon an inference of guilt from the defendant's choice in declining to testify on his own behalf. This factor has special importance in a criminal case with its substantial burden of proof. Hence, the decision to testify or not places the defendant in a precarious position.

This impeaching technique has been recently criticized as to its potential unconstitutionality.[13] *Loper* provides a partial solution by preventing evidence of prior invalid convictions to be admitted to impeach a defendant-witness's credibility where his character is not the ultimate issue in the case. The exclusion of character evidence to prove conduct is predicated on the possible dangers of prejudice, surprise, and the shift of the jury's attention from the material issue of guilt to the collateral issue of character.[14] Where evidence

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[8] 405 U.S. 473, 482 n.11 (1972); *see, e.g.*, Bruton v. United States, 391 U.S. 123 (1968); Massiah v. United States, 377 U.S. 201 (1964); McNabb v. United States, 318 U.S. 332 (1943); Jordan v. Cardwell, 428 F.2d 325 (6th Cir. 1970).

[9] Texas law authorizes the jury to discretionarily impose a five-year imprisonment-to-death sentence if it finds the defendant guilty. TEX. PEN. CODE art. 1189 (Vernon 1961).

[10] *See, e.g.*, the statutes listed in C. MCCORMICK, EVIDENCE § 43, at 85 (2d ed. Cleary 1972).

[11] *Id.* at 89.

[12] Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965).

[13] *See* Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DEPAUL L. REV. 1 (1968); Note, *Impeaching the Accused by His Prior Crimes—A New Approach to an Old Problem*, 19 HAST. L. REV. 919 (1968); Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426 (1964).

[14] Comment, *An Eclectic Approach to Impeachment by Prior Convictions*, 5 J. LAW REFORM 522, 523 (1972). *See generally* Phinney v. Detroit United Ry., 232 Mich.

of prior invalid convictions is introduced, questions are raised concerning the reliability of a trial court's fact-finding process.

The first question is whether the prior convictions are valid at the time they are sought to be introduced for impeachment. In *Loper*, the defendant admitted, during his trial, four prior felony convictions.[15] At his babeas corpus hearing, petitioner Loper confirmed his allegation that these convictions were constitutionally invalid under *Gideon* by producing corroborative court records.[16] Yet *Gideon* was not the first to invalidate a conviction for denying a constitutional right. *Powell v. Alabama,*[17] decided a year after Loper's first felony conviction, held that a trial court's failure to give reasonable time and opportunity for a defendant to secure counsel was a clear denial of the fourteenth amendment's due process clause by depriving the defendant of his constitutional right to counsel. Yet even had there been a reasonable opportunity, the circumstances were such that counsel was "so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process."[18] Although subsequent cases limited this decision to certain capital cases,[19] *Powell* did demonstrate that the right to counsel was fundamental to our adversary system.[20] In a decision rendered five years later, the United States Supreme Court held that where the accused may be deprived of life or liberty, the sixth amendment's right to counsel was now applicable to the federal courts.[21] This "realistic recognition of the obvious truth"[22] that the average layman lacks the necessary knowledge to adequately protect his legal and constitutional rights in a court in capital cases was guaranteed in both state and federal courts during at least three of Loper's felony convictions.

During Loper's 1947 trial (the subject of the present collateral attack by writ of habeas corpus), a Supreme Court ruling modifying these earlier decisions was then in force.[23] Mr. Chief Justice Burger's dissent in *Loper* interpreted the prevailing law in 1947, to uphold the validity of Loper's three prior felony convictions, regardless of their constitutional validity under the law pre-

399, 205 N.W. 124 (1925); Sims v. Soule, 238 Ore. 329, 395 P.2d 133 (1964) (dictum); Rich v. Cooper, 234 Ore. 300, 380 P.2d 613 (1963) (dictum).

15 405 U.S. 473, 474 (1972).

16 *Id.* at 478.

17 287 U.S. 45 (1932).

18 *Id.* at 71.

19 *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963).

20 Notice and the opportunity to be heard are preliminary steps essential for an enforceable judgment and are basic requisites of due process of law. Powell v. Alabama, 287 U.S. 45, 68, 69 (1932): "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman . . . requires the guiding hand of counsel at every step. . . . Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." For an excellent historical discussion of the American right to counsel during the colonial period, see Mr. Justice Sutherland's opinion in *Powell. Id.* at 61.

21 Johnson v. Zerbst, 304 U.S. 458 (1938).

22 *Id.* at 462.

23 Betts v. Brady, 316 U.S. 455 (1942).

vailing when the convictions were rendered. However, this interpretation of the prevailing law in 1947 was erroneous, as *Betts v. Brady*[24] was not a reversal of this absolute right to counsel, but was a limitation of the right determined by a case-by-case analysis. Such a right depended upon qualifying factors and an appraisal of the total facts in a given case.[25] This case introduced the element of indigency as a factor.[26] Much criticism[27] of the *Betts* limitation led the Court to rationalize it by redefining due process of law,[28] and distinguishing its application in federal and state courts. The Court justified a state court's decision on federalism grounds where the state law required the court to assign counsel *only* if requested.[29] The ninth amendment was construed to permit states to exercise their own police powers,[30] and hence, their own criminal trial procedure according to the state constitution and statutes.[31] Mr. Justice Douglas strongly dissented as to the value of a constitutional guaranty to a fair trial without counsel to advise and defend the accused where the constitutional standard of fairness depends upon what court the accused is in.[32]

Perhaps this construction can be rationalized where the crime was noncapital in nature. The Court disregarded the federalism concept in two capital cases where the accused defendants were interrogated by police and confessed without the benefit of counsel.[33] One case, relying on *Powell*, reversed the conviction based on admitted evidence of the confession.[34] The conviction

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[24] 316 U.S. 455 (1942).

[25] *Id.* at 462: "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

[26] *Id.* at 477: "Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law." See Black's dissent for the duty owed to the impoverished. *Id.* at 474-77.

[27] See cite to Cohen and Griswold's article in the *N.Y. Times* discussed in the Douglas dissent in *Bute v. Illinois*, 333 U.S. 640, 678 (1948): "Most Americans—lawyers and laymen alike—before the decision in *Betts v. Brady* would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our Bill of Rights. . . . Yet at a critical period in world history, *Betts v. Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under the law."

[28] See this redefinition in *Bute v. Illinois*, 333 U.S. 640 (1948). *See generally* Powell v. Alabama, 287 U.S. 45, 61 (1932).

[29] Bute v. Illinois, 333 U.S. 640 (1948).

[30] *Id.* at 649; *accord*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[31] *See, e.g.*, ILL. CONST. art. III (1970); ILL. REV. STAT. ch. 38, § 113-3 (1964). For additional support of the Supreme Court's rationale, *see* WICKERSHAM, REPORT ON PROSECUTION 30 (1931).

[32] Bute v. Illinois, 333 U.S. 640, 678 (1948). *See* the dissenting opinion at 682: "[I]t is the *need* for counsel that establishes the real standard for determining whether the lack of counsel rendered the trial unfair. . . . That need is measured by the *nature* of the *charge* and the *ability* of the *average* man to face it alone, unaided by an expert in the law."

[33] Spano v. New York, 360 U.S. 315 (1951); Crooker v. California, 357 U.S. 433 (1958).

[34] Spano v. New York, 360 U.S. 315 (1951). See Mr. Justice Douglas' concurrence for an excellent reason why this was a flagrant violation of *Powell*. *But see Gallegos v. Nebraska*, 342 U.S. 55 (1951), in which the Court affirmed a state court conviction of manslaughter in accordance with the federalism theory.

was affirmed in the second case by a 5-4 decision.[35] The majority held the accused was not deprived due process where his intelligence and legal education outweighed the absence of counsel.[36] Mr. Justice Douglas, again dissenting, stated that the fourteenth amendment's due process was an absolute with no degrees based on such fine factors as age, intelligence, or education.[37]

Paralleling the constitutional right to counsel question in *Loper* was the question of the right to an *appointment* of counsel where the accused is an indigent. Loper's testimony at the habeas hearing indicated that he could not have afforded counsel in at least two of his prior convictions. However, since 1930, there has been an evident trend towards the appointment of counsel.[38] The constitutional right of an indigent defendant's aid on appeal or in pursuing a postconviction remedy was first recognized in *Griffin v. Illinois*.[39] There, a state statute provided free transcripts for appeals by indigent defendants sentenced to death, and the appellate courts required a record of the trial proceedings certified by the trial judge. Hence, those too poor to acquire a certified copy with sentences less than death, were precluded from appellate review. In a 5-4 decision, the Court declared that the ability to pay the cost of an appeal bears no rational relation to a defendant's guilt or innocence and cannot be used as an excuse to deprive the defendant of a fair hearing.[40] Since the *Griffin* decision, the Supreme Court has consistently expanded the indigent defendant's rights in a criminal case.[41]

These parallel lines of cases (an accused's right to counsel and an indi-

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[35] Crooker v. California, 357 U.S. 433 (1958). *But see* Miranda v. Arizona, 384 U.S. 436, 479 n.48 (1966).

[36] *Accord,* Chandler v. Fretag, 348 U.S. 3 (1954); Lisenba v. California, 314 U.S. 219 (1941); Powell v. Alabama, 287 U.S. 45 (1932).

[37] Crooker v. California, 357 U.S. 433, 442 (1958). *See also* Cicenia v. Lagay, 357 U.S. 504 (1958); Black, dissenting in *In re* Groban, 352 U.S. 330, 340 (1957); Glasser v. United States, 315 U.S. 60, 76 (1942); Sutherland's opinion in Powell v. Alabama, 287 U.S. 45, 69 (1932).

[38] *See* Note 41, *supra.*

[39] 351 U.S. 12 (1956).

[40] *Id.* at 17. Mr. Justice Black expounded on the age-old problem of equal protection for the rich and poor alike. *See also* Chambers v. Florida, 309 U.S. 227, 241 (1940).

[41] *See generally* Argersinger v. Hamlin, 407 U.S. 25 (1972) (a state may not imprison a person for any offense unless he was represented by counsel absent a knowing and intelligent waiver); Williams v. Illinois, 399 U.S. 235 (1970) (a state may not constitutionally imprison a defendant financially unable to pay a fine beyond maximum statutory sentence); Long v. District Court, 385 U.S. 192 (1966) (a state cannot condition appeal to indigent upon any financial consideration); Douglas v. California, 372 U.S. 353 (1963) (denying indigent the aid of counsel on appeal is a violation of fourteenth amendment); Lane v. Brown, 372 U.S. 477 (1963) (reaffirmed *Griffin*); Coppedge v. United States, 369 U.S. 438 (1962) (shifted burden of proof to government to show lack of merit where criminal appeal petition in forma pauperis); Smith v. Bennett, 365 U.S. 708 (1961) (equal protection precludes state statute requiring filing fee by indigent before applying for habeas corpus relief or appeal); Burns v. Ohio, 360 U.S. 252 (1959) (requirement that indigent pay filing fee before filing motion for leave to appeal is unconstitutional); Eskridge v. Washington State Bd., 357 U.S. 214 (1958) (equal protection requires free trial transcript for indigent defendant); *accord,* Daugharty v. Gladden, 257 F.2d 750 (9th Cir. 1958); Medberry v. Patterson, 188 F. Supp. 557 (D.C. Colo. 1960). *But cf.* Britt v. North Carolina, 404 U.S. 226 (1972) (a state not required to provide free transcript for indigent in retrial under existing circumstances).

gent accused's right to appointment of counsel) were merged in *Gideon v. Wainwright*,[42] thereby expanding the defendant's constitutional rights in a criminal case. The Court explicitly overruled the *Betts* test of appraising the totality of the facts in a given case. *Betts* was considered a break with well-settled precedent where ten years before that decision, the Supreme Court unequivocally declared the right to counsel was of a fundamental character.[43] Combining with this return to established precedent was the Court's extension of that precedent.[44] Defendants in a criminal case unable to employ counsel must be provided with counsel in both federal and state courts unless the right is completely and intelligently waived.[45] Yet, *Gideon* was not a radical departure for the *Betts* rule had been in gradual demise since the day it was decided.[46] Prior to *Gideon*, forty states furnished counsel to indigent felons only, while only five appointed counsel only to indigents charged with capital offenses.[47] A companion case to *Gideon* required appointed counsel for an indigent on appeal.[48] The latest extension of *Gideon* was rendered in *Argersinger v. Hamlin*.[49] The Court held that no person may be imprisoned for any offense, petty misdemeanor, misdemeanor, or felony, unless he was represented by counsel at his state court trial, absent a knowing and intelligent waiver.[50]

Gideon has been held retroactive.[51] It has been held that a change in the law will be given effect while a case is on direct review.[52] Retroactive application of a subsequent ruling of an invalid prior final judgment, when collaterally attacked, depended upon the status of claimed vested rights and public policy.[53] In 1971, a new test evolved which expanded retroactive application to instances where the truth-determining procedure substantially impaired the accuracy of the guilty verdicts.[54] This test was confirmed and made absolute "regardless

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[42] 372 U.S. 335 (1963).

[43] *See generally* Powell v. Alabama, 287 U.S. 45 (1932). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936).

[44] 372 U.S. 335, 344 (1963): "Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

[45] *See, e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962); Chewning v. Cunningham, 368 U.S. 443 (1962).

[46] Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103, 104 nn. 12, 13 & 14 (1970).

[47] *Id.* at 133.

[48] Douglas v. California, 372 U.S. 353 (1963).

[49] 407 U.S. 25 (1972).

[50] *Id.* at 37.

[51] *See* Note 5 *supra*.

[52] *See generally* Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

[53] Linkletter v. Walker, 381 U.S. 618 (1965). The Court has applied new constitutional rules to cases *finalized before* the promulgation of the rule. *See, e.g.*, Reck v. Pate, 367 U.S. 433 (1961) (retroactively applied to 1937 conviction); Eskridge v. Washington State Bd., 357 U.S. 214 (1958) (retroactively applied to 1935 conviction).

[54] "Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." Williams v. United States, 401 U.S. 646, 653 (1971). *Accord*, in result although not in application: Berger v. California, 393

of good faith reliance by law enforcement authorities or the degree of impact on the administration of justice" in *Adams v. Illinois*.[55] Hence, when the majority held *Gideon* retroactively applied to Loper's prior felony convictions, the Court was adhering to its newly established rule, and by implication, declared the use of invalid prior convictions to impeach, substantially impaired the accuracy of the lower court's guilty verdict.

It is apparent that the Supreme Court has been expanding the rights of defendants accused of a crime ever since the *Powell* decision, forty years ago. The right to counsel at virtually every phase of a case, from interrogation[56] to appeal,[57] is assured unless the defendant intelligently and knowingly waives this right.[58] Merging with this right are the relatively new rights granted to indigents, discussed above. The state has entered this area thereby filling a void that previously permitted unequal protection.[59]

The primary reason underlying this merger of the expanding constitutional rights of indigent defendants accused of crime was stressed by the Court long ago in *Powell*:

> [H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.[60]

This concept of fair and equal treatment is basic to our criminal adversary system, and so well entrenched in judicial history that a denial of such treatment

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U.S. 314 (1969) (retroactive effect to *Barber v. Page*, 390 U.S. 719 (1968)); Arsenault v. Massachusetts, 393 U.S. 5 (1968) (retroactive effect to right of counsel in *White v. Maryland*, 373 U.S. 59 (1963)); McConnell v. Rhay, 393 U.S. 2 (1968) (retroactive effect to right of counsel in *Mempa v. Rhay*, 389 U.S. 128 (1967)); Roberts v. Russell, 392 U.S. 293 (1968) (retroactive effect to *Bruton v. United States*, 391 U.S. 123 (1968)).

[55] 405 U.S. 278, 280 (1972) (although refusing to give retroactive effect to *Coleman v. Alabama*, 399 U.S. 1 (1970)).

[56] Massiah v. United States, 377 U.S. 201 (1964). *Accord*, Escobedo v. Illinois, 378 U.S. 478 (1964).

[57] Griffin v. Illinois, 351 U.S. 12 (1956).

[58] Gideon v. Wainwright, 372 U.S. 335 (1963). *See also* Papachristou v. Jacksonville, 405 U.S. 156 (1972) (representation of counsel for vagrancy offense); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury extended to states where possible punishment six months or more); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses in serious offenses); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation in state courts); *In re* Oliver, 333 U.S. 257 (1948) (right to public trial in misdemeanor cases); FED. R. CRIM. P. 44.

[59] Argersinger v. Hamlin, 407 U.S. 25, 31-32 (1972), *citing* Gideon v. Wainwright, 372 U.S. 335 (1963): "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

[60] Powell v. Alabama, 287 U.S. 45, 61 (1932).

is deemed a violation of fundamental due process of law. To permit favor to be given to one party over the other could impair the truth-finding goal and render an unjust verdict. Consequently, the Court's holding came as no surprise that the use of Loper's prior unconstitutional felony convictions, in accordance with the state recidivist statute, violated due process.

Recidivist statutes, like the Texas one involved in the *Loper* case, are common.[61] Such statutes do not create a separate offense, but do create a "status" where the defendant's repetitive criminal behavior is indicative of "depravity which merits greater punishment."[62] This attitude was taken in *Spencer v. Texas*,[63] where the Court upheld the common law procedure. This procedure consists of reading the indictment or information alleging the substantive offense and the prior convictions to the jury at the beginning of the trial, thereby allowing the jury to determine guilt or innocence on the substantive offense and recidivism at the same trial. *Spencer* held there was no violation of due process where there was only the *possibility* of some collateral prejudice.[64] However, in the same year, the Supreme Court held in *Burgett v. Texas*[65] that the use of prior felony convictions, invalid under the *Gideon* rule for lack of counsel, was inherently prejudicial and was not harmless error. *Burgett* also indicated that states are free to promulgate their own rules of evidence absent constitutional infringement, but that *Gideon* demonstrated that the constitutional limitations on state criminal procedure might also touch state rules of evidence.[66]

Apparently, the *Burgett* decision did not resolve all questions concerning the use of prior felony convictions, invalid under *Gideon*, in criminal trials. The United States Courts of Appeals have rendered incongruous decisions on precisely this issue.[67] To resolve this conflict in the circuits, the Supreme Court granted certiorari in *United States v. Tucker*[68] to decide whether the sentence handed down in a federal case would have been different had the sentencing judge been aware that enhancement of the sentence relied on prior convictions unconstitutionally obtained.[69] The Court held that a sentence based on an assumption concerning a criminal record which may be materially untrue

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[61] *See, e.g.*, 18 U.S.C. § 3575 (1971); ARIZ. REV. STAT. ANN. § 13-1649 (1956); CAL. PEN. CODE ANN. § 644 (West 1970); IOWA CODE § 747.1 (1971); N.Y. PEN. LAW §§ 1941, 42 (McKinney 1967).

[62] Sigler v. State, 157 S.W.2d 903, 905 (Tex. Crim. App. 1941); *accord*, Ellison v. State, 227 S.W.2d 545 (Tex. Crim. App. 1950).

[63] 385 U.S. 554 (1967).

[64] *Id.* at 559. *But see* Chief Justice Warren's strong dissent that evidence of prior convictions jeopardizes the presumption of innocence. *Id.* at 569.

[65] 389 U.S. 109 (1967); *accord*, United States v. Webb, No. 72-2961 (9th Cir. 1972); Wright v. Craven, 461 F.2d 1109 (9th Cir. 1972). *See also* Mr. Justice Jackson's statement in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

[66] Burgett v. Texas, 389 U.S. 109, 114 (1967).

[67] *Compare* Howard v. Craven, 446 F.2d 586 (9th Cir. 1971) *and* Gilday v. Scafati, 428 F.2d 1027 (1st Cir. 1970) *and* United States v. Martinez, 413 F.2d 61 (7th Cir. 1969) *with* United States *ex rel.* Walker v. Follette, 443 F.2d 167 (2d Cir. 1971).

[68] 404 U.S. 443 (1972).

[69] *Id.* at 448.

was not harmless error beyond a reasonable doubt, and "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case."[70]

While the *Tucker* case concerned the use of prior invalid convictions to enhance punishment, *Loper* concerns such use to support guilt.[71] The Court concluded that the error of admitting prior invalid convictions to impeach the defendant's credibility was not a harmless one, but one of constitutional magnitude, depriving Loper of due process of law.[72] Citing from a first circuit opinion, the Court declared:

> that the *Burgett* rule against use of uncounseled convictions "to prove guilt" was intended to prohibit their use "to impeach credibility," for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt.[73]

Loper, then, decides that the use of prior convictions, invalid under *Gideon,* may not be introduced as evidence to impeach a defendant's credibility in the presence of the trier of fact. To permit such use would be to implant an inference of guilt, thereby perverting the inviolable presumption of innocence until proven guilty of the *alleged* crime. A contrary result would transform the adversary system into an inquisition by the state. An inquisitorial system would necessarily disrupt the balance between the prosecution and the defense in favor of the prosecution. Undue and unchallenged assertions by the prosecution would inevitably eliminate essential due process where there has been no opportunity to weigh both sides in determining the truth. Consequently, doubt would be cast on the reliability of the fact-finding process.[74] This is particularly true where the trier of fact is a jury. A judge sitting as fact-finder may be able to sift through invalid assertions and disregard their prejudicial effect to arrive at truth because of his knowledge of the law of evidence. Yet a jury composed of laymen lacking knowledge of evidence may be swayed by prejudicial statements and influences, and consequently be diverted from arriving at an

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[70] *Id.* at 449, *citing* Burgett v. Texas, 389 U.S. 109, 115 (1967). For an indication of the trend precipitated by *Tucker,* see *Wheeler v. United States,* No. 72-1771 (9th Cir., Oct. 6, 1972) and *United States v. Janiec,* 464 F.2d 126 (3d Cir. 1972).

[71] 405 U.S. 473, 482 (1972).

[72] *Id.* at 483 n.12.

[73] *Id.* at 483, *citing* Gilday v. Scafati, 428 F.2d 1027, 1029 (1st Cir. 1970). Relying on *Loper, Wingate v. Wainwright,* 464 F.2d 209 (5th Cir. 1972), held that evidence of prior acquittals cannot be used as proof of the crime charged as it violates defendant's rights under the double jeopardy clause of the fifth amendment applied to the states by the fourteenth amendment.

[74] Mackey v. United States, 401 U.S. 667, 671 (1971). But see *United States v. Castro-Castro,* 464 F.2d 336 (9th Cir. 1972), wherein the court allowed evidence of prior acquittals to be admitted to show intent followed by carefully limiting jury instructions.

objective truth. Mr. Justice Powell, in his concurring opinion in *Argersinger v. Hamlin*,[75] indicated that if the line is to be drawn, it should allow an indigent the right to appointed counsel where the right to a jury trial exists. Hence, the absolute right to counsel[76] presumes the inherent unreliability of the trial where counsel is absent, unless there has been a visibly intelligent and knowing waiver of that right.[77]

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[75] 407 U.S. 25, 45-46 (1972): "It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial. An unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant. If there is no accompanying right to counsel, the right to trial by jury becomes meaningless."

[76] *See generally* Argersinger v. Hamlin, 407 U.S. 25 (1972); Coleman v. Alabama, 399 U.S. 1 (1970); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Spano v. New York, 360 U.S. 315 (1959); Crooker v. California, 357 U.S. 433 (1958); Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

[77] Gideon v. Wainwright, 372 U.S. 335 (1963); *accord*, Ybarra v. United States, 461 F.2d 1195 (9th Cir. 1972).

CRIMINAL LAW—WHERE TESTIMONY COMPLAINED OF WAS STRICKEN AND THE WITNESS WAS ALLOWED TO RETESTIFY, NO CONSTITUTIONALLY INADMISSIBLE EVIDENCE WAS SUBMITTED TO THE JURY IF THE PREJUDICIAL EFFECT OF THE TESTIMONY DID NOT REMAIN IN SPITE OF ITS EXCLUSION.—*State v. Peterson* (Iowa 1971).

On September 7, 1968, police were summoned to an Emmetsburg supermarket where an early morning break-in had occurred. Upon their arrival, three individuals fled from the store's rear entrance, two of them escaping under gunfire. Almost immediately thereafter, defendant was discovered hiding under a nearby gas truck, and a cocked and loaded revolver was subsequently found on the undercarriage of the truck. In testifying before the grand jury which indicted defendant with breaking and entering with intent to commit larceny, the chief of police testified, "I asked him where the two other persons were and he said, 'I don't know, I just came from Spencer'." However, during the trial the police chief was asked about defendant's comments on the other two subjects; the officer replied, "*He wouldn't answer me.*" Defendant's attorney then objected on the grounds that a motion in limine barring comment upon the defendant's exercise of his constitutional right to remain silent had been granted by the court. After overruling defendant's motion for a mistrial and without instructing the jury to disregard the previous testimony, the court allowed the police officer to answer the same question again as he had before the grand jury. Defendant maintained on appeal to the Iowa supreme court that his constitutional right to remain silent had been violated and that the trial court therefore erred in overruling his motion for mistrial. *Held*, affirmed, three justices dissenting. No constitutionally inadmissible evidence was submitted to the jury since the testimony complained of was stricken and the witness allowed to retestify, and it did not manifestly appear that the prejudicial effect of the testimony remained despite its exclusion. *State v. Peterson*, 189 N.W.2d 891 (Iowa 1971).

Historically, comment upon an accused's silence in a criminal proceeding has run the gamut of propriety.[1] At various times, for example, it has been considered proper for the court or prosecuting attorney to call attention to the failure of the accused to take the stand, both as a legitimate inference of guilt[2] and to encourage the defendant to reveal knowledge peculiarly his.[3] Running

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[1] *See* State v. Ferguson, 226 Iowa 361, 283 N.W. 917 (1939).

[2] Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 MICH. L. REV. 226 (1932).

[3] Note, *Comment on the Defendant's Failure to Take the Stand*, 57 YALE L.J. 145, 149 (1947).